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In The

Supreme Court of the United States

October Term, 1953

No. 72

A. B. Swinerton, Richard Walberg and Howard Hassard, Doing Business as Swinerton and Walberg Company, and James Burns & Sons, Inc.,
Petitioners,

vs.

National Labor Relations Board,
Respondent.

MEMORANDUM OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR AS AMICUS CURIAE

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MEMORANDUM OF BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR AS AMICUS CURIAE URGING GRANT OF CERTIORARI

Sec. 8(a) of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. Supp. V 151, et seq.) outlaws the closed shop but allows a union, after certification, to require employees to become members of it. The question presented in the present case is whether where there is no possibility of certification (because elections are admittedly impracticable in the building trades industry) an unfair labor practice is actionable which certification would undoubtedly avoid.

The Building Trades Department of the A. F. of L. is composed of more than 3,000,000 construction workers. The court below and the Congress[1] have admitted the inability of the NLRB, due to the short-term transitory nature of employment in the building trades industry, to hold representation elections to designate a collective bargaining agency. Such an election results in a Board certification which gives the union the exclusive privilege to negotiate a union shop agreement. Such an agreement has obvious advantages to the union; it is likewise beneficial to the contractor in that it guarantees him a continuous supply of skilled labor.

The inability of the NLRB to hold an election subjects the building trades unions to the possible abuses which the present case illustrates. Had there been the power of election the unfair labor practice herein would never have occurred; if after certification positions became available the applicant would have been accepted subject to its joining a union within the 30-day period. It is no answer to this argument for the Government to contend (Gov. Br. pp. 12-13) that even with certification the union could not do what it did in the present case. The point is that the denial of the right of certification to the building trades unions lays those unions and their employees open to harassment from other unions against which they are bound to protect themselves. Thus the one-sided operation produces rather than restrains industrial strife.

Construed as it was below, the Act is entirely unilateral so far as the building trades are concerned; this immense group is subjected to all the penalties of the Act without possibility of receiving any of its advantages. Indeed the Act thus construed denies such unions the right to function as unions at all; the most ordinary and usual union activities are proscribed. The lack of certification

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[1] Sen. Rep. No. 1509, 82nd Congress, 2nd Session, pp. 4-6.

not only permits, it invites predatory unions to come in and upset long-standing contractual arrangements. The long-term effect of inability to secure certification is to discourage contractors from making any agreements at all with building trades unions, who thus are thrown on their own resources for self-protection. Such a situation militates against the prime purposes of the Act and actually creates industrial unrest.

Under these circumstances it may be seriously questioned whether the Act does not deprive the building trades unions of their rights of contract and of property under the Fifth Amendment; at least they have been placed at a gross disparity with respect to other unions. It may, however, be unnecessary for this Court to examine the validity of the Act, in this posture. The alternative solution is to inquire into the propriety of the NLRB's assertion of jurisdiction in this type of case. Whether to take jurisdiction is ordinarily a question solely for the Board;[1] however, in the present case the net result is a gross abuse, destructive of the very object of the Act itself. No rule of law compels a governmental board to sustain a so-called private right at the expense of a great public wrong. (*Cf. U. S. ex rel. Greathouse* v. *Dern*, 289 U.S. 352).

The building trades unions, three million strong, are traditionally the most conservative and stable element in American labor. They merit something better than a one-sided application of a statute, which exposes them to raids from all quarters. We disagree with the court below that this is a matter for future legislation; our belief is that any such holding as the present is contrary to the admitted object of the Act; certainly the Board's action is unnecessarily discriminatory and uncalled for.

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[1] Except in the event of an abuse of discretion, *NLRB* v. *Atkinson Co.*, 195 F. (2) 141; *Haleston Drug Stores, Inc.* v. *NLRB*, 187 F. (2) 418.

We therefore urge the issuance of the writ to review the substantial questions of unilateral application of the Act herein presented.

Respectfully submitted,

BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR

By RICHARD J. GRAY
President

WILLIAM E. LEAHY

WILLIAM J. HUGHES, JR.
Attorneys for
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CORNELIUS R. GRAY
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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Amicus Curiae Brief in Support of Petition for a Writ of Certiorari.

Filed on Behalf of National Constructors Association.

To the Honorable Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The undersigned appears herein as *amicus curiae* and submits the within Brief in support of the Petition for a writ of certiorari filed by petitioners above named. Counsel appears on behalf of the National Constructors Association, the members of which are listed in Appendix "A." Consent to the filing of such Brief has been extended by petitioner and by the Acting Solicitor General of the United States.

Opinions Below.

The Decision and order of the National Labor Relations Board [R. 67-75] is reported in 94 NLRB 1079. The opinion of the United States Court of Appeals for the Ninth Circuit [R. 268-279] is reported in 202 F. 2d 511.

Jurisdiction.

The decree of the United States Court of Appeals was entered on February 17, 1953 [R. 263]. The jurisdiction of this Court has been invoked by petitioner under 28 U. S. C., Section 1254(1), and 29 U. S. C. (Supp. 111), Section 160(e).

Questions Presented.

1. Whether it effectuates the policies of the National Labor Relations Act to prosecute unfair labor practice charges against employers in the building and construction industry at a time when, for over five years, employers and unions in such industry have been denied the benefits and protection of the representation provisions of the Act.

2. Whether the enforcement of an order of the National Labor Relations Board against employers in the building and construction industry based upon unfair labor practice charges filed by the International Association of Machinists in furtherance of its jurisdictional claims constitutes a denial of due process of law in contravention of the Fifth Amendment, where for over five years employers and unions in such industry have been denied the benefits and protection of the representation provisions of the National Labor Relations Act.

Statute Involved.

The statute involved is the National Labor Relations Act, 29 U. S. C., Section 151 *et seq.*, as amended by the Labor Management Relations Act, 1947, 29 U. S. C., Section 141 *et seq.* (hereinafter referred to as the "Act"). The pertinent provisions of the Act are printed in Appendix "A," pages i-viii of the Petition for a Writ of Certiorari.

I.

The Instant Litigation Presents a Typical Example of Numerous Proceedings Wherein the Same Union Has Utilized the Provisions of the National Labor Relations Act as a Sword Instead of a Shield, Contrary to the Intent of Congress.

A. The Association's Interest.

The National Constructors Association is a group of engineering and construction firms which are engaged, upon a nation-wide basis, in the designing and building of industrial plants and facilities, primarily in the field of oil refineries, steel plants and chemical plants. Member companies are currently engaged in industrial construction projects in forty of the forty-eight states. At various times since the enactment of the National Labor Relations Act, the total field employment by member companies of building trades mechanics and laborers has reached in excess of 100,000, inclusive of those employed by subcontractors. The work volume of member companies in terms of projects currently under way or under contract for later construction totals the sum of two billion dollars. In addition to its engineering and construction services to large and important segments of American

industry, members of the Association also serve some of the major departments of the Federal government, including the Atomic Energy Commission, the Army Corps of Engineers, the Army Chemical Corps, the Army Ordnance Department, the Department of the Navy and General Services Administration. Many of these projects are secret in nature and are directly involved with national security.

The Association has received some prominence in recent years for its endeavors to achieve stability in labor relations in the construction industry (149 Engineering News Record, No. 19, p. 117, 11/6/52). The stature of the Association and the eminence of its personnel in the industry is further indicated by the appointment of its current President, Mr. John J. O'Donnell, as a member of President Eisenhower's Labor Management Advisory Committee headed by the Secretary of Labor. The Association and its members, therefore, have a real and significant interest in the interpretation and application of the National Labor Relations Act, particularly as the same affects the building and construction industry.

The construction projects of the member companies are in most instances of such magnitude as to eliminate any question as to the coverage of the work under the present jurisdictional standards of the National Labor Relations Board in administering the Act. Often, such a project not only represents the largest single enterprise in the immediate area, but also involves employment of a substantial majority of building tradesmen resident in that area. For this reason, the labor practices and policies of the member company exert dominant, though sometimes temporary, influence upon the construction industry in the area.

In one important respect, the Association is unique. This uniqueness stems from the fact that member companies not only serve as *general contractors,* employing such building tradesmen as carpenters, bricklayers and laborers, but also as *specialty contractors,* employing directly such trades as electricians, pipefitters, millwrights and boiler-makers. *The Association is, therefore, the only national group which has interest covering all aspects of the construction industry from the standpoint of employment and labor relations.*

B. Relationship of the Instant Litigation to the Operations of Members of the National Construction Association.

The undersigned, as *amicus curiae* herein, has been requested by the Association to point out to the Court the representative nature of this type of litigation and to emphasize that similar administrative proceedings and judicial holdings are by no means isolated or occasional. The brief of petitioner herein has listed representative instances of virtually identical proceedings which have been instigated by the International Association of Machinists against other general contractors, including members of this organization. Supplementing such list there are set forth in Appendix "B" hereto, additional instances of proceedings before the Board involving the same issue contained in the instant case.

Disputes of this type plague and harass the construction industry. They appear to represent a deliberate endeavor upon the part of the Machinists Union to capitalize upon the one-sided administration and application of the Act in this field of industry. The processing of such cases by the Union commenced while the office

of the NLRB General Counsel was wrestling with the many perplexing problems attendant upon the holding of representation elections in this fluid and changeable type of employment situation. The institution of charges and complaints increased as it became apparent that the problem was administratively impracticable and incapable of solution. A comparison, in this industry, of the number of unfair labor practice cases of this type since the 1947 amendments to the Act with the negligible number of representation cases since that date bears mute testimony to the one-sided application of the law.

The instant litigation is truly representative of this type of administrative and judicial proceeding. *Amicus curiae* wishes to stress the fact that all contractors are continually beset by the threat of such actions through enforcement of the unfair labor practice sections of the Act while they are at the same time denied the use of the Act's procedural provisions for the determination of representation questions. The presentation of this issue to the Supreme Court presents an opportunity for judicial rectification of an administrative anomaly. *Amicus curiae,* on behalf of the National Constructors Association, wishes to reiterate that this is no mere isolated or exceptional case, but that it serves as a representative example of the inequity constantly present as a result of the Board's enforcement of the Act's penalties while denying its privileges.

II.

The Enforcement of the Unfair Labor Practice Provisions of the Act Against Employers and Unions in the Construction Industry Defeats Rather Than Effectuates the Purposes of the Act. The Order of the Board in This Case Having Been Issued Under a One-sided Administration of the Act It Is in Excess of the Board's Delegated Authority and Should Be Set Aside.

The well considered contentions of the petitioners persuasively set forth various compelling reasons why this Court should grant a writ of certiorari to review the decree of the United States Court of Appeals. *Amicus curiae* will not undertake herein to reiterate or amplify such reasons. It is the purpose of this brief to demonstrate that the instant type of litigation is encountered repeatedly by employers in the building and construction industry and to urge this Court to rectify this aggravated situation wherein a one-sided administration of the law results in the frustration of the basic objectives of that law and in the denial of due process in contravention of the Fifth Amendment to the United States Constitution.

The court below and the National Labor Relations Board defend the imposition of penalties by the contention that the facts indicate the Petitioner would have been guilty of transgressing Section 8(a)(3) even if a representation election had been held. This, however, is assuming a set of circumstances which has seldom been permitted to arise under the admitted inability of the

NLRB General Counsel to conduct elections for the employees of general contractors as distinguished from specialty contractors. An illustration will serve to demonstrate that availability of the representation procedure might well have resulted in a situation which would have deterred if not precluded the charging parties in this proceeding from having been able to assert a claim of discrimination under the Act.

Had the election procedure in the Act been available in the building and construction industry, as it has been in manufacturing, it is entirely likely that the AFL Building & Construction Trades Department Unions (including the carpenters organization) would have been the certified bargaining agent of petitioners' employees. The domination of those groups in the construction field is well known. (See Covington, "Jurisdiction of the National Labor Relations Board Over the Building and Construction Industry," 2 No. Car. Law Rev. 1, 2.) Furthermore, the local chapter of the Associated General Contractors of America, as the contractors group and the employers' bargaining representative would have been considered as the appropriate unit and *as one employer*. (This was the manner in which the Board handled these issues in the Olean & Baltimore representation cases,[1] two of the few building industry cases wherein the Board found it possible to conduct elections.) The next logical consequence which would have followed would have been an election under the provisions of the then applicable Section 9(e) in which the traditionally union-security-

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[1] *Plumbing and Heating Contractors Ass'n*, 93 NLRB 1081; *Plumbing Contractors Ass'n of Baltimore*, 93 NLRB 1099.

minded craftsmen would have undoubtedly authorized the negotiation of the 30-day union shop clause found in the collective bargaining agreement [R. 139-140; U. S. Bureau of Labor Statistics, Bulletin No. 909, June 24, 1947, pp. 2, 7]. While the mere execution of such a clause might not have precluded the applicants herein from approaching petitioners for employment, it is highly possible that they would have achieved 30 days service with AGC members prior to application, in which event they would have either achieved membership status or could have been lawfully rejected for further employment by any company in the multiple-employer unit.

All of the foregoing, which is clearly within the realm of probability and logical likelihood if the full privileges of the law had been extended to petitioners, was denied these companies. Instead, they are being exposed to penalties and the continuing possibility of similar strife-provoking jurisdictional raids predicated upon this administrative loophole which has rendered one of the basic precepts of the Act unavailable to employers in this industry.

Accordingly, it does not suffice for the National Labor Relations Board and the Court of Appeals to assert that legislative relief should be sought to correct this glaring inequity. Judicial relief is clearly available and should be extended in the premises. This Honorable Court should not condone these repeated instances of the processing of unfair labor practice charges which, had the representation procedure set forth in the Act been made available to all, might in all probability have never been filed.

Conclusion.

For the reasons set forth above and by petitioner it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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MESERVE, MUMPER & HUGHES,
LEWIS T. GARDINER,
Of Counsel.

Appendix "A."

Members of the National Constructors Association

Bechtel Corporation.

C. F. Braun & Company.

Chemical Construction Corporation.

Day & Zimmerman, Inc.

The H. K. Ferguson Company, Inc.

The Fluor Corporation, Ltd.

Ford, Bacon & Davis Construction Corporation.

Foster Wheeler Corporation.

The Girdler Corporation.

Graver Construction Company.

Hydocarbon Research Corporation.

The M. W. Kellogg Company.

Koppers Company, Inc.—Engineering & Construction Division.

The Lummus Company.

Arthur G. McKee & Company.

J. F. Pritchard & Company.

Procon Incorporated.

The Rust Engineering Company.

Stone & Webster Engineering Corporation—Badger Process Division.

Associate Members

The Babcock & Wilcox Company.

Universal Oil Products Company.

Appendix "B."

RECENT N.L.R.B. PROCEEDINGS INVOLVING ASSOCIATION MEMBERS IN MACHINIST-MILLWRIGHT CONTROVERSIES OVER WORK JURISDICTION.

The Fluor Corporation, Ltd., NLRB 39-CA-95.

Graver Tank and Manufacturing Co., Inc., NLRB 39-CA-225.

The Kellogg Company, NLRB 39-CA-207.

The Kellogg Company, 94 NLRB 526.

The Lummus Company, NLRB 39-CA-205.

The Lummus Company, NLRB 39-CA-215.

Arthur G. McKee & Company, NLRB 39-CA-80, 196 Fed. 2d 636.

Stone & Webster Engineering Corporation, NLRB 39-CA-206.

CERTIORARI DENIED